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FILED
FEB 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1097

GEORGE S. YUMICH AND PHILIP STEVEN SHEAR,
BY HIS FATHER AND NEXT FRIEND, DR. SIDNEY SHEAR,
Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Petitioners respectfully move the Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on January 22, 1973, and granting the Petition. As grounds for rehearing, petitioners represent to the Court that significant developments occurring since the original Petition was filed on February 28, 1972 warrant the motion.

I.

THE GRANT OF CERTIORARI IN MOOR v. COUNTY OF ALAMEDA, NO. 74-10, OCTOBER TERM, 1971, BRINGS TO THE COURT AN ISSUE ALL BUT IDENTICAL TO THE PRINCIPAL ISSUE PRESENTED IN THIS CASE.

On October 10, 1972, over seven months after the filing of the Petition in the present case, the Court granted a petition for certiorari in *Moor* v. *County of Alameda,* No. 74-

10, October Term, 1971. In the petition in *Moor*, the Civil Rights Act issue was stated as follows (p. 2):

> 1. Whether, if state law imposes vicarious liability upon its public entities for the Civil Rights Act (42 U. S. C. §§ 1981 *et seq.*) violations of the entities' employees, *Monroe* v. *Pape*, 365 U. S. 167 (1961), allows a Federal court to use 42 U. S. C. § 1988 to adopt that state law and obtain jurisdiction under 28 U. S. C. §§1343(3) and (4) to impose that state-created liability.

In the present case, Petitioners posed the following two questions (Petition, p. 2):

> 2. Does not the abolition of the doctrine of sovereign immunity by the State of Illinois undercut the rule in *Monroe* v. *Pape* barring damage actions against municipal corporations under Section 1983?
>
> 3. Does not Section 1988 of the Civil Rights Act require a Federal court, in fashioning remedies under Section 1983, to acknowledge the significance of state law abolishing sovereign immunity?

The petitioners in *Moor* and the Petitioners in the present case both contended, as reasons for granting their respective petitions, that there was a conflict between the decisions below (Ninth Circuit in *Moor*, Seventh Circuit in the present case) and the decision of the Court of Appeals for the District of Columbia in *Carter* v. *Carlson*, 447 F. 2d 358 (1971), recently reversed by this Court under the name of *District of Columbia* v. *Carter*, 41 Law Week 4127 (January 10, 1973). After reciting the conflict (pp. 7-9), the petitioners in *Moor* stated (p. 9):

> The necessity for resolving this conflict can be seen from the fact that the trend among states is to abolish the doctrine of sovereign immunity and to make entities such as the County of Alameda financially responsible for the torts of their employees. As a result, the question of whether a federal court can use 42 U. S. C. § 1988 to adopt these state laws for the protec-

> tion of federal rights and thus obtain jurisdiction over a public entity by virtue of 28 U. S. C. §§ 1343(3) and (4) is a highly important question that is bound to continue to arise and create confusion until a definitive ruling is handed down by this Court. Since a definitive ruling must, of necessity, involve an interpretation of *Monroe,* only this Court can now make that ruling.

In the present case, Petitioners, after pointing out the conflict with *Carter,* stated that (p. 6):

> The State of Illinois has determined that its local governmental units should be accountable for the wrongs of their agents. It has established a state ruling of liability for such units which, under § 1988, should be utilized to serve the broad remedial policies of the Federal Civil Rights Act.

The petitioners in *Moor* and the Petitioners in the present case contrasted the treatment of Section 1988 in *Carter* with the treatment by the Courts of Appeals for the Ninth and Seventh Circuits, respectively, and both argued that Section 1988 provided a basis in the Civil Rights Acts for holding municipal corporations liable in damages in instances in which the state had abolished the doctrine of sovereign immunity. Both petitions claimed Federal jurisdiction pursuant to Section 1343 of Title 28, a section which has been referred to as the jurisdictional counterpart of Section 1983. *Eisen* v. *Eastman,* 421 F. 2d 560 (1969).[1]

The granting of the Petition for Certiorari in *Moor* thus strongly suggests that the scope and interpretation of Section 1988 of the Civil Rights Acts are issues which the Court views as significant. The precise formulations in

1. Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment", is the common source of Section 1983 and Section 1343(3); the phrase "rights, privileges or immunities" secured by the Constitution and Federal laws contained in both statutes has been treated as having the same meaning. *Carter* v. *Greenhow,* 114 U. S. 317 (1885).

Moor and in the present case may differ somewhat, yet the same essential question is presented in both: *Does Section 1988 afford a proper means of seeking to hold a municipal corporation liable in damages, in a state where sovereign immunity has been abolished, despite the decision of this Court in Monroe* v. *Pape, 365 U. S. 167 (1961)?*

It seems somewhat anamolous that the Section 1988 issue as formulated in *Moor* is to be heard and decided by this Court, whereas the Section 1988 issue formulated in the present case is not.

II.

A RECENT DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, McDANIEL v. CARROLL, DECIDED APRIL 11, 1972, RECOGNIZES THAT SECTION 1988 MAY BE USED TO INCORPORATE INTO FEDERAL LAW A STATE RULE OF RESPONDEAT SUPERIOR HAVING TO DO WITH PUBLIC OFFICERS.

Although the Court of Appeals in *Carter* relied in part on Section 1988, this Court's decision of January 10, 1973 in *District of Columbia* v. *Carter*, 41 Law Week 4127, did not reach Section 1988, since the holding is essentially that, within the meaning of Section 1983, the District of Columbia is not a "state or territory".

The view of Section 1988 expressed earlier in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), continues to be followed by Courts of Appeals. In a decision of the Court of Appeals for the Sixth Circuit decided after the Petition in the present case was filed, *McDaniel* v. *Carroll*, 457 F. 2d 968 (April 11, 1972), the court relied on Section 1988 and Tennessee law to reject the contention of a defendant sheriff that, under Federal law, "damages may not be assessed against a principal for acts committed by an agent and not participated in or ratified by the principal" (457 F. 2d 968, 969).

In the present case, under Illinois law, the City of Chicago and every other Illinois municipal corporation can be held liable in damages for the torts of their agents. In *McDaniel*, under Tennessee law, a sheriff could be held liable for both compensatory and punitive damages for torts committed by one of his deputies in the performance of his duties. Section 1983, read literally, subjects to liability only those persons who do certain things proscribed by it. As the Court of Appeals for the Ninth Circuit pointed out in *Hesselgesser* v. *Reilly*, 440 F. 2d 901, 902-03 (1971), "The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. . . . Thus if one who did not participate in such violation is to be held liable . . . it must be because: (1) the Civil Rights Act gives recognition to the laws of the states pertaining to such liability and, (2) the laws of the particular state where the action arose create such liability." In *Hesselgesser*, therefore, the court incorporated into Federal law, by means of Section 1988, the applicable state rule.

The abolition of the doctrine of sovereign immunity is, in part at least, simply a recognition of the need to apply the general concept of *respondeat superior* to the growing area in which public officials and employees may act tortiously against private persons. If state law, therefore, permits a city to be held liable in damages for the torts of its police officers, why should not Section 1988 be available to incorporate that rule into Federal law in furtherance of the purposes of the Civil Rights Acts, just as comparable state rules were so incorporated in *McDaniel* and *Hesselgesser*?

III.

THIS COURT'S DECISION IN DISTRICT OF COLUMBIA v. CARTER CONTAINS AN EXPRESS SUGGESTION THAT THERE IS A DIRECT REMEDY UNDER THE CONSTITUTION FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

In reversing the decision of the Court of Appeals in *District of Columbia* v. *Carter*, 41 Law Week 4127 (1973), this Court stated:

> This is not to say, of course, that a claim . . . of alleged deprivation of constitutional rights is not litigable in the federal courts. . . . See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971); *Bell* v. *Hood*, 327 U. S. 678 (1946).

In *Bell* v. *Hood*, this Court upheld a claim for damages against the wrongful acts of Federal agents asserted directly under the Fourth and Fifth Amendments; in *Bivens*, the direct claim arose only under the Fourth Amendment. Insofar as the claim in *Bell* v. *Hood* rested on the due process clause of the Fifth Amendment, it is difficult to understand why that clause should give rise to a cause of action against wrong-doing Federal agents whereas the same clause of the Fourteenth Amendment cannot give rise to a cause of action against wrong-doing state agents. The language of the Fourteenth Amendment, without more, makes it clear that it is directed against state action: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Petitioners' complaint claimed relief on the basis of the Fourteenth Amendment. This Court, by its decision in *District of Columbia* v. *Carter*, has determined that Section 1983 does not reach the wrongdoing of persons who act under color of "any statute, ordinance, regulation, custom, or usage . . ." of the District of Columbia, for the reason that the District is not a "state or territory", but it left

open the possibility of a claim, as in *Bell* v. *Hood*, directly under the Constitution. If Section 1983, because of *Monroe* v. *Pape*, cannot be used to impose liability on a municipal corporation—even with the help of Section 1988—for the wrongful acts of its agents in a state where sovereign immunity has been abolished, *why cannot the aggrieved person, whose constitutional rights have been invaded, bring a claim directly under the due process clause of the Fourteenth Amendment?*

CONCLUSION.

For the reasons stated in this Petition for Rehearing, as well as those in the original Petition for Certiorari, this matter merits reconsideration. It is therefore urged that the order of January 22, 1973 be vacated and that the Petition for Certiorari be granted.

Respectfully submitted,

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February 9, 1973.

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CERTIFICATE OF COUNSEL.

As one of the attorneys for Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the ground specified in Rule 58(2).